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# Contributions of the Chambers of the International Tribunal for the Former Yugoslavia on the provisional rules of procedure and evidence for the Court, submitted to the Preparatory Commission

## Information paper submitted by the delegations of Bosnia and Herzegovina, Canada, Colombia, Egypt, Portugal and Spain concerning Part 6 of the Rome Statute: the trial

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# I. Introduction and note on expedition of proceedings[1]

1. In July 1999, the judges of the International Tribunal for the Former Yugoslavia submitted a report to the Preparatory Commission regarding the Rules of Procedure and Evidence of the International Criminal Court (ICC). The report focused, *inter alia*, on the role of judges in the rule-making process, trial management issues and evidentiary rules. The report was presented by Judge Gabrielle Kirk McDonald, who was then President of the Tribunal, to the Preparatory Commission on 30 July 1999.

2. The Preparatory Commission has now drafted provisional Rules of Procedure and Evidence[2] ("Provisional Rules"). The judges, acting on suggestions that the Tribunal's experience might be useful to the Preparatory Commission in its consideration of the Provisional Rules, have prepared some additional information and comments regarding certain matters that are in dispute in the Provisional Rules or that have not been addressed therein. The intention is simply to share the Tribunal's experience and practice in a few key areas that were not covered in the Judges' previous report. The areas that have been selected for comment are limited and primarily concern aspects of the Tribunal's jurisprudence and practice that may be of particular benefit to the Preparatory Commission.

3. The topics that have been chosen for comment include sexual violence, particularly rules regulating the admission of evidence of consent and prior sexual conduct; the Victims and Witnesses Unit; defence counsel; and enforcement of sentences. In addition, the judges would also reiterate the central theme of their July 1999 report: the ICC Rules of Procedure and Evidence must provide the Court's judges with the tools to expedite proceedings. The Tribunal has grappled with the issue of providing expeditious trials to accused individuals and has taken a number of steps to quicken its proceedings. In this regard, the judges would draw the attention of the Preparatory Commission to their July report and would also note the recent Expert Group Report,[3] which contains a number of additional proposals that are currently under review by all of the organs of both ad hoc Tribunals. The judges have found that every aspect of the process must be carefully examined to ensure that the proceedings are carried out fairly and efficiently and that time is not wasted. While there is no doubt that proceedings in the International Criminal Court, as in the International Tribunal, will be complex and difficult, it is imperative that justice be accomplished in as efficient a manner as possible. Thus, in addition to the following comments, which are provided in a spirit of cooperation, the judges would reiterate the lessons and comments set forth in their previous report of July 1999.

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[1] The present document should be read in conjunction with documents PCNICC/2000/WGRPE(4)/INF/1 and PCNICC/2000/WGRPE(10)/INF/1.

[2] PCNICC/1999/L.5/Rev.1/Add.1.

[3] Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, see United Nations document A/54/634.

# II. Evidence in cases of sexual violence

## A. Purpose-made set of rules

4. In establishing the ICTY, the Secretary-General stressed the need to afford adequate measures in the Rules of Procedure and Evidence to protect victims and witnesses of sexual violence: "In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape or sexual assault."[4]

5. The Tribunal's first annual report to the Security Council and the General Assembly[5] explained how, in pursuance of its mandate, the judges endeavoured to create a "purpose-made set of rules" which would facilitate its work in trying the crimes within the jurisdiction of the Tribunal: war crimes, crimes against humanity and genocide.[6] The Rules of the Tribunal thus consider the ways these crimes were committed and the forms they took in the conflict in the former Yugoslavia, and incorporated rules that take into account the conspicuous nature of the crimes committed during the conflict. The judges attempted to establish rules that address issues of particular concern arising from the conflict, namely patterns of conduct, the protection of witnesses and sexual assault. Moreover, they found that evidence relating to patterns of conduct would be particularly relevant in matters of sexual assault, to establish the existence of coercion sufficient to vitiate any alleged consent.

6. The report further noted that the Tribunal recognized the gender-based character of the crimes committed in the conflict, and thus "placed special emphasis on crimes against women in the [Rules, which] refer generally to crimes of sexual assault, rather than to the specific category of rape, and make special provision as to the standard of evidence, and matters of credibility of the witness, which may be raised by the defence.[7]

## B. Drafting history of Tribunal rule 96

7. While many of the rules affect victims and witnesses of sex crimes, the primary rule governing evidentiary considerations in cases of sexual assault is rule 96. The original rule 96 specified:

> "In cases of sexual assault:
>
> (i) No corroboration of the victim's testimony shall be required;
>
> (ii) Consent shall not be allowed as a defence;

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[4] United Nations document S/25704, para. 108.

[5] A/49/342-S/1994/1007, paras. 75 and 76.

[6] The International Tribunal has subject-matter jurisdiction over war crimes (article 2, grave breaches of the 1949 Geneva Conventions; article 3, violations of the laws or customs of war), crimes against humanity (article 5) and genocide (article 4). See S/25704, annex, arts. 2-5.

[7] A/49/342-S/1994/1007, para. 82.

(iii) Prior sexual conduct of the victim shall not be admitted in evidence."[8]

8. As the first annual report further noted: "If a defence of consent is raised, the Tribunal may take note of factors that vitiate consent, including physical violence and moral or psychological constraints."[9] Thus, inherently coercive or threatening conditions preclude the use of consent as a defence, and this requirement was deemed necessary by the judges in drafting the rules in order to protect victims and witnesses and to facilitate and reflect legal and factual developments.

9. However, it was also recognized that, even during wartime, situations exist where consent should be allowed as a defence (e.g., to counteract injustices if allegations of rape arise in situations such as when a soldier refuses to pay a prostitute). Therefore, in the interests of justice, the judges decided that allowing consent to be raised as a defence should not be precluded altogether. Rule 96 was hence amended to include the following exceptions:

"... (ii) Consent shall not be allowed as a defence if the victim: (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear."[10]

10. Thus the rule precludes allowing consent as a defence when any of the four specified conditions — violence, duress, detention, or psychological oppression — are present. The final amendment of rule 96 specified procedural requirements to be followed when consent is raised, stipulating that before admitting evidence of the victim's consent, the accused must satisfy the Trial Chamber in camera that the evidence is credible and relevant.[11] In it second annual report, the Tribunal emphasized that rule 96 had been amended to add this procedural requirement in order "to protect the rights of victims and witnesses".[12] Thus, this amendment was not intended to erode the protections afforded in rule 96, but instead to afford increased protections to victims and witnesses of sexual violence. There has to date been no jurisprudence concerning in camera determinations regarding the admission of consent as a defence. Further, sub-rule (i), which states that corroboration of the victim's testimony is not required, is not discussed here as it is apparently settled and included in the ICC provisional rules, albeit in a separate rule from the one specifically governing sexual violence.[13]

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[8] IT/32, 14 March 1994.

[9] A/49/342-S/1994/1007, para. 83.

[10] IT/32/Rev.1, 5 May 1994, amended at the third plenary session.

[11] IT/32/Rev.3, 30 January 1995, revised at the fifth plenary session. Rule 96 has not been changed since 30 January 1995. See, e.g. IT/32/Rev.17, 7 December 1999.

[12] A/50/365-S/1995/728, para. 27.

[13] Corroboration is dealt with in ICC provisional rule 6.1, general provisions, which states, in subpara. (c): "Without prejudice to article 66, paragraph 3, a Chamber of the Court shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular crimes of sexual violence." On this issue, see Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, 2 September 1998, para. 135; Prosecutor v. Duško Tadić, Opinion and Judgment, IT-94-1-T, T. Ch., 7 May 1997, para. 536; Prosecutor v. Anto Furundžija, Judgement, IT-95-17/1-T, 10 December 1998, para. 116; Prosecutor v. Clement Kayishema & Obed Ruzindana, Judgement, ICTR-95-1-T, 21 May 1999, para. 70; Prosecutor v. Alfred Musema, Judgement, ICTR-96-13-T, 27 January 2000, paras. 45-46. Rule 96 of the

11. As noted, Tribunal rule 96 governs the admissibility of evidence in cases of sexual violence and has specific provisions in regard to allowing evidence concerning consent and prior sexual conduct of the victim. Because issues surrounding admissibility of consent and prior sexual conduct are unresolved in the Preparatory Commission and remain open to debate,[14] the judges provide this brief recitation of the drafting history, application and jurisprudence of Tribunal rule 96, in the hope that it will provide assistance to the Preparatory Commission in drafting the Rules of Procedure and Evidence on these issues for the International Criminal Court.

## C. Rule 96 as interpreted by the Tribunal

12. In a decision concerning the application of rule 96 rendered during the course of the *Čelebići* trial, the Trial Chamber outlined the history of rule 96 and noted that, despite the non-technical character of the Rules in general, rule 96 was a special evidentiary rule that was not governed by the presumption of admissibility that applied to other Rules. The Trial Chamber also noted that prior to establishing the Tribunal, the Security Council had repeatedly condemned the rape crimes committed in the territory of the former Yugoslavia and expressed alarm at the continuing detention and rape of women.[15] Further, the Trial Chamber explained:

> "The rationale underlying the existence of such a provision [that restricts the use of consent as a defence and excludes prior sexual conduct] is closely related to the nature of the conflict during which the crimes over which the International Tribunal has jurisdiction were committed and where appalling allegations have been made of the systematic and mass rape of women ...
>
> "In drafting rule 96, the judges of the International Tribunal took into account all of the above-mentioned concerns. In addition, the judges carefully considered national proceedings regarding sexual assault cases and focused mainly on recent developments in national laws regarding the prosecution of sexual offences. Therefore, *it is through this unique perspective that rule 96 must be examined and interpreted; namely, within a distinctive approach on sexual assault cases by an international tribunal established to do justice, deter crimes and to contribute to the restoration and maintenance of peace.*"[16]

13. Rule 96 was intended to take into account the commission of crimes coming within the jurisdiction of the Tribunal, and its provisions were deemed necessary to protect adequately the victims and witnesses of crimes of sexual violence. In

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Rwanda Tribunal goes slightly further, and references issues of corroboration of a child's testimony.

[14] See PCNICC/1999/L.5/Rev. 1/Add. 1, rule 6.5, and PCNICC/1999/DP.1, rule 101 (iv).

[15] Prosecutor v. Zejnil Delalić et al., "Celebići," Decision on the Prosecution's Motion for the Redaction of the Public Record, IT-96-21-T, 5 June 1997, paras. 43-44, *citing* Security Council resolutions 798 (1992), 808 (1993), 820 (1993) and 827 (1993). It further noted that the Special Rapporteur for the United Nations Human Rights Commission, the Commission of Experts established pursuant to Security Council resolution 780 (1992) and non-governmental organizations "stressed that due to fear of reprisals, retraumatization and feelings of shame, survivors of the conflict would be reluctant to appear as witnesses before the International Tribunal" unless adequate protective measures were established and enforced. Idem, para. 46.

[16] Čelebići, Decision on the Prosecution's Motion for the Redaction of the Public Record, idem, paras. 44 and 47 (emphasis added).

fundamental ways, the mandate and subject matter jurisdiction of the Tribunal are not dissimilar to that of the International Criminal Court, and it is likely that crimes of sexual violence, including situations in which women are subjected to sexual violence during detention or other coercive conditions, will come before the Court. There are persuasive grounds for adapting the rules relating to sexual violence to an international context, thus applying different presumptions and admissibility standards than are generally followed in domestic contexts.

14. ICC provisional Rule 6.1 (e) states that the Chambers "shall not apply national laws governing evidence, other than in accordance with article 21". While this is obviously a sound general proposal, a review of State practice or recent trends may on occasion be useful if there is a lacuna in international law. Indeed, the *Tadić* Trial Chamber noted that "the need to show special consideration to individuals testifying about rape and sexual assault has been increasingly recognized in the domestic law of some States."[17]

15. As might be expected, issues of consent and prior sexual conduct are less likely to be raised in the type of cases coming within the jurisdiction of the Tribunal than they would be in domestic adjudications of rape allegations. Nonetheless, there has been occasion when the Tribunal has had need to interpret the provisions of rule 96.

## D. Consent (Tribunal sub-rule 96 (ii))

16. In regard to consent, in the *Tadić* case, there were allegations that both males and females were subjected to various forms of sexual violence. In addressing these issues, the Trial Chamber explained: "In consideration of the unique concerns of victims of sexual assault, a special rule for the admittance of evidence in cases of sexual assault was included in the Rules of the International Tribunal. Rule 96 provides that corroboration of the victim's testimony is not required and consent is *not allowed* as a defence if the victims have been subject to physical or psychological constraints."[18] Thus, even if consent is raised, if an in camera determination reveals that any of the four conditions were present, the Rule bars its inclusion. There are strong public policy reasons supporting this approach. Particularly in situations of armed conflict or such grave unrest that crimes against humanity or genocide are present, history demonstrates the extraordinary vulnerability of women and girls to victimization of sexual violence. Precluding consent as a defence when the aforementioned coercive conditions are present provides additional protections necessary to prevent further abuse and affirms that these crimes will no longer be tolerated. The *Tadić* Trial Chamber, in making determinations concerning protective measures for victims and witnesses of sexual violence, acknowledged that it must balance the right of the accused to a fair trial against the rights of victims and witnesses, and noted the "special concerns of victims of sexual assault".[19] The stigmatization and mental traumatization particular to sex crimes result in a need for special rules, and when these crimes are committed

[17] Prosecutor v. Duško Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, IT-94-1-T, 10 August 1995, para. 47.

[18] Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, idem, para. 49 (emphasis added).

[19] Idem, para. 50.

during the context of war or as a means of facilitating crimes against humanity or genocide, the situation is sufficiently unique to justify additional protections and measures.

17. Similarly, the *Furundžija* case involved a woman who was repeatedly raped while being detained during the course of interrogation. The Judgment noted: "Consent was not raised by the Defence, and in any case, Witness A was in captivity. Further, it is the position of the Trial Chamber that *any form of captivity vitiates consent*."[20] Thus, even had consent been raised, because the victim was in detention and the assailant was part of the oppressing forces, the Rule automatically excludes the use of consent as a defence.

## E. Prior sexual conduct (Tribunal sub-rule 96 (iv))

18. In the *Čelebići* case, the Chamber considered that the prime objective of Sub-rule 96 (iv), which prevents prior sexual conduct of the victim from being admitted into evidence, is to protect the victims from harassment, embarrassment, and humiliation. The Trial Chamber noted that this provision seeks to prevent situations where the admission of certain evidence may lead to a confusion of the issues, therefore offending the fairness of the proceedings. Moreover, it noted that when adopting Sub-rule 96 (iv), due regard was given to the fact that in rape or other sexual assault cases, evidence of prior sexual conduct of the victims mainly serves to call the reputation of the victim into question. It was further considered that the value, if any, of information about the prior sexual conduct of a witness in the context of trials of this nature was nullified by the potential danger of causing additional distress and emotional harm to the witnesses.[21] Thus, the Trial Chamber emphasized: "Sub-rule 96 (iv) is an exclusionary rule which totally forbids the introduction of evidence concerning prior sexual conduct in sexual assault cases and there can be no waiver of its imperative application."[22]

19. The International Criminal Court, like the International Tribunal, will not have a jury system and it will hear many of the same types of cases of gross violations of international humanitarian law as are prosecuted in the ad hoc Tribunals. Despite the fact that judges are quite adept at not considering prejudicial evidence, nonetheless the judges drafting the rules deemed it necessary to impose special measures to protect victims of sexual violence, including the exclusion of any evidence relating to prior sexual conduct of the victim: "The judges of the International Tribunal are triers of fact and law. As triers of fact the judges are presumed to be less susceptible to prejudicial evidence than a jury. However, at the time of the adoption of the Rules, it was considered that in the interests of justice, the existence of sub-rule 96

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[20] Prosecutor v. Anto Furundžija, Judgement, IT-95-17/1-T, 10 December 1998, para. 271 (emphasis added).

[21] Čelebići, Decision on Prosecution's Motion for the Redaction of the Public Record, *supra* note 14, para. 48.

[22] Čelebići, Decision on Prosecution's Motion for the Redaction of the Public Record, idem, para. 58. In paragraph 49, the decision cites Canada as urging the Tribunal, in drafting its Rules of Procedure and Evidence, to "find evidence concerning a victim's prior sexual history to be irrelevant, in challenging or supporting her credibility, assessing the gravity of the offence, determining the likelihood of consent or as a consideration in sentencing." (IT/15, 29 November 1993)

(iv) was required."[23] As noted above, consent is inadmissible when certain conditions are present. However, in consideration of the crimes within the jurisdiction of the Tribunal, it was determined that no situations could justify allowing the defence to submit evidence of prior sexual conduct of the victim.

## F. Other considerations of admissibility

20. Sexual violence may take various forms. In certain contexts, such as torture by means of rape, sex crimes as an integral part of the commission of genocide, or enslavement for purposes of sexual slavery, issues of consent and prior sexual conduct do not come into play, as one cannot consent to torture, genocide or slavery and any prior sexual conduct would not be relevant. Thus, when crimes of sexual violence are prosecuted under the terms of the Statute of the Tribunal as a crime other than "rape", e.g., as enslavement, torture, genocide, etc., defences such as consent are automatically excluded, as not being legally recognizable defences to such crimes. In other words, while consent is allowed as a defence in certain instances of sexual assault, it is never a defence to crimes such as torture or genocide. In such cases, the sexual violence must simply satisfy the elements of the specific crime charged. In the *Čelebići* case, the *actus reus* of forcible sexual penetration was successfully prosecuted as a form of torture. In the judgement, the Chamber stated that "it is difficult to envisage circumstances by which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict."[24] It would also be inherent in conditions giving rise to crimes against humanity and genocide. For consistency in the Rules and their application, it is necessary to devise rules that do not treat the same *actus reus*, sexual penetration, with completely different standards, depending on the specific enunciation of the crime being prosecuted.

21. The ad hoc Tribunals and the International Criminal Court were established to prosecute persons responsible for some of the most heinous international crimes. In establishing rules addressing the types of crimes that will likely come before the Court, the experiences of the International Tribunal for the Former Yugoslavia could perhaps provide helpful guidance in drafting the rule concerning admitting evidence in cases of sexual violence.

## G. The ICC provisional rule regarding evidence in cases of sexual violence

22. The International Tribunal for the Former Yugoslavia has made important progress towards affording protections to victims of wartime sexual violence. If the Rules adopted by the International Criminal Court reverse the presumption of no consent, and allow an accused to assert, for instance, that he or she mistakenly believed that the victim consented, even though detention or other inherently

[23] Čelebići, Decision on the Prosecution's Motion for the Redaction of the Public Record, *supra*, note 14, para. 50.

[24] Prosecutor v. Zejnil Delalić et al., "Čelebići", Judgement, IT-96-21-T, 16 November 1998, para. 495.

coercive circumstances exist, and even when these circumstances were attributable to the accused, then the very protections intended to be afforded by rules governing evidence in cases of sexual violence in the context of war or civil strife are undermined and controverted.

23. The ICC proposed draft provides:

> "(a) Where the accused intends to introduce or elicit evidence as to whether the victim consented to an alleged crime of sexual violence, the accused shall provide notice to the Court, and shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case;
>
> "(b) Before admitting such evidence, a Chamber shall, having regard to articles 67, 68 and 69, hold a hearing in camera to determine whether:
>
> (i) Any force, threat of force, coercion or taking an advantage of a coercive environment did not affect adversely the victim's ability to consent; and
>
> (ii) The evidence has sufficient probative value as to justify its admissibility, taking into account, *inter alia*, any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in particular the victim, in accordance with article 69, paragraph 4;
>
> and shall specify which parts of the evidence are admissible."[25]

24. The provisional rule also provides, in sub-rule (c): "The silence or lack of resistance by the victim is not a basis for drawing an inference that the victim consented to the alleged sexual violence." While sub-rule (c) appears to be a progressive development, provisional sub-rules (a) and (b) could usefully be re-examined. Given that the ICC Statute reflects the consensus of States on the crucial need to prosecute gender-based crimes, the Preparatory Commission should take a cautious approach to reversing the progressive steps made in this important area by the ad hoc Tribunals.

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[25] PCNICC/1999/L.5/Rev.1/Add.1, fn 81, stating that this proposal was developed in informal consultations during the November-December 1999 session of the Preparatory Commission, with a view to replacing rule 6.5. Rule 6.5 states:
*Evidence in cases of sexual violence:*

> "(a) No consent exists where the victim:
> "(i) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, abuse of power or other coercive circumstances; or
> "(ii) Reasonably believed that if the victim did not submit, another person might be so subjected, threatened or put in fear.
> "(b) In cases where the Trial Chamber is not satisfied that the conditions in subparagraph (a) exist, the Trial Chamber shall satisfy itself in camera that the evidence is highly relevant and credible before evidence of the victim's consent is admitted."

**N.B. Consideration needs to be given to the issues concerning evidence regarding prior sexual conduct, as contained in PCNICC/1999/DP.1, rule 101 (iv).**